2003

State of Utah v. Carlos Mendez : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	)	
	)	
Plaintiff/Appellee,	)	
vs.	)	
CARLOS MENDEZ,	)	Case No. 20030617CA
	)	
Defendant/Appellant.		

BRIEF OF APPELLANT

APPEAL FROM CONVICTION FOR ONE COUNT OF RIOT, A THIRD DEGREE FELONY IN VIOLATION OF U.C.A. §76-9-101, IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR WEBER COUNTY, STATE OF UTAH, THE HONORABLE MICHAEL D. LYON PRESIDING.

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BRIEF OF APPELLANT

JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is from a conviction based upon a plea of guilty by the Defendant to the charge of Riot, a third-degree felony. The plea of guilty was taken before the Honorable Michael D. Lyon on the 5th day of December 2002.

STATEMENT OF ISSUES ON APPEAL AND STANDARD OF REVIEW

POINT I

DID THE TRIAL COURT ERR IN DENYING THE DEFENDANT'S MOTION TO WITHDRAW HIS GUILTY PLEA?

PRESERVATION IN THE TRIAL COURT: *This issue was preserved for appeal* by the timely filing of a motion to withdraw his plea (R. 29), and hearings and a ruling on that motion (R. 49).

THE STANDARD OF REVIEW: The Court reviews "a trial court's denial of a motion to withdraw a guilty plea under an abuse-of-discretion standard." *State v. Blair*, 868 P.2d 802, 805 (Utah 1993)." The Court applies "the clearly erroneous

standard for the trial court's findings of fact made in conjunction with that decision." *State v. Benvenuto*, 983 P.2d 556, 558 (Utah 1999). "However, the ultimate question of whether the trial court strictly complied with constitutional and procedural requirements for entry of a guilty plea is a question of law that is reviewed for correctness." *State v. Benvenuto*, 983 P.2d 556, 558 (Utah 1999) (See also *State v. Thurman*, 911 P.2d 371, 372 (Utah 1996).

POINT II

WAS THE DEFENDANT DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, AND ARTICLE 1, SECTIONS SEVEN AND TWELVE OF THE UTAH CONSTITUTION BY HIS ATTORNEY'S FAILURE TO INFORM DEFENDANT OF THE EVIDENCE IN THE CASE.

PRESERVATION IN THE TRIAL COURT: *This issue was preserved for appeal* by the timely filing of a motion to withdraw his plea (R. 29), and hearings and a ruling on that motion (R. 49).

STANDARD OF REVIEW: The appellate court must determine as a matter of fact and law whether the Defendant was denied his right to effective assistance of counsel. In *Strickland v. Washington*, 466 U.S 668, 80 L.Ed.2d 674 (1984), the United States Supreme Court articulated a two part test, which was adopted in *State v. Templin*, 805 P.2d 182 (Utah 1990), to determine whether counsel was ineffective. The Court held that;

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel

was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Id.* at 466 U.S. at 687, 80 L.Ed. 2d at 693.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

UNITED STATE CONSTITUTION

Forth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Fourteenth Amendment

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF THE STATE OF UTAH

Article I, Section 7. [Due process of law]

No person shall be deprived of life, liberty or property, without due process of law.

Article I, Section 12. [Rights of accused persons]

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

UTAH CODE ANNOTATED

***Section 76-9-101.* Riot — Penalties.**

(1) A person is guilty of riot if:
(a) Simultaneously with two or more other persons he engages in tumultuous or violent conduct and thereby knowingly or recklessly creates a substantial risk of causing public alarm; or

(b) He assembles with two or more other persons with the purpose of engaging, soon thereafter, in tumultuous or violent conduct, knowing, that two or more other persons in the assembly have the same purpose; or

(c) He assembles with two or more other persons with the purpose of committing an offense against a person or property of another who he supposes to be guilty of a violation of law, believing that two or more other persons in the assembly have the same purpose.

(2) Any person who refuses to comply with a lawful order to withdraw given to him immediately prior to, during, or immediately following a violation of Subsection (1) is guilty of riot. It is no defense to a prosecution under this Subsection (2) that withdrawal must take place over private property; provided, however, that no persons so withdrawing shall incur criminal or civil liability by virtue of acts reasonably necessary to accomplish the withdrawal.

(3) Riot is a felony of the third degree if, in the course of and as a result of the conduct, any person suffers bodily injury, or substantial property damage, arson occurs or the defendant was armed with a dangerous weapon, as defined in Section 76-1-601; otherwise it is a class B misdemeanor.

UTAH RULES OF CRIMINAL PROCEDURE

Rule 11(e)

e) The court may refuse to accept a plea of guilty, no contest or guilty and mentally ill, and may not accept the plea until the court has found:

(1) If the defendant is not represented by counsel, he or she has knowingly waived the right to counsel and does not desire counsel;

(2) the plea is voluntarily made;

(3) the defendant knows of the right to the presumption of innocence, the right against compulsory self-incrimination, the right to a speedy public trial before an impartial jury, the right to confront and cross-examine in open court the prosecution witnesses, the right to compel the attendance of defense witnesses, and that by entering the plea, these rights are waived;

(4) (A) the defendant understands the nature and elements of the offense to which the plea is entered, that upon trial the prosecution would have the burden of proving each of those elements beyond a reasonable doubt, and that the plea is an admission of all those elements;

(B) there is a factual basis for the plea. A factual basis is sufficient if it establishes that the charged crime was actually committed by the defendant or, if the defendant refuses or is otherwise unable to admit culpability, that the prosecution has sufficient evidence to establish a substantial risk of conviction;

(5) the defendant knows the minimum and maximum sentence, and if applicable, the minimum mandatory nature of the minimum sentence, that may be imposed for each offense to which a plea is entered, including the possibility of the imposition of consecutive sentences;

(6) if the tendered plea is a result of a prior plea discussion and plea agreement, and if so, what agreement has been reached;

(7) the defendant has been advised of the time limits for filing any motion to withdraw the plea; and

(8) the defendant has been advised that the right of appeal is limited.

These findings may be based on questioning of the defendant on the record or, if used, a written statement reciting these factors after the court has established that the defendant has read, understood, and acknowledged the contents of the statement. If the defendant cannot understand the English language, it will be sufficient that the statement has been read or translated to the defendant.

Unless specifically required by statute or rule, a court is not required to inquire into or advise concerning any collateral consequences of a plea.

SUPREME COURT RULES OF PROFESSIONAL PRACTICE
UTAH RULES OF PROFESSIONAL CONDUCT

Rule 1.4. Communication.

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
(b) A lawyer shall explain a matter to the extent reasonably necessary to enable the client to make informed decisions regarding the representation.

STATEMENT OF THE CASE

On November 19, 2002, the Defendant was charged with the offense of Riot, a third degree felony in violation of UCA § 76-9-101, (R. 01). On December 5, 2002 the Defendant waived his preliminary hearing and was arraigned on the charge by the court (R. 17). The Defendant pled guilty to the charge on December 5, 2002 and, on January 9, 2003, was sentenced to an indeterminate term in the Utah State Prison not to exceed 5 years (R. 19, 20). The Defendant then filed a motion to withdraw his guilty plea on January 14, 2003, and the court, after oral argument denied that motion on July 10, 2003 (R. 49). The Defendant filed a notice of appeal on July 30, 2003 (R. 41).

STATEMENT OF THE FACTS

On November 19, 2002, the Defendant was charged with the offense of Riot, a third degree felony in violation of UCA § 76-9-101, (R. 01). On December 5, 2002 the Defendant waived his preliminary hearing and was arraigned on the charge by the court (R. 17). At that time, the Defendant entered into a plea negotiation wherein he pled guilty to the offense of Riot, as charged in the information in exchange for the State agreeing, "not to file any other charges, including a murder charge they were considering." (R. 48 /2). During the plea colloquy the prosecutor presented to the court a recitation of facts supporting the plea. The prosecutor stated that the Defendant was involved in a riot with additional facts as follows:

> Mr. Mendez is one of the four individuals that was present [in an altercation]... that resulted in the death of Daniel Montgomery. But Mr. Mendez's particular involvement was that he acknowledged to Detective Zaccardi that he approached Mr. Montgomery in his vehicle and spoke to him that day prior to any altercation. And then Mr. Montgomery – and when his – Mr. Montgomery and his friends came back, Mr. Mendez was one of the four that was there. And that he pushed one of the individuals in the altercation that occurred afterwards. And there were also fingerprints on the car that were Mr. Mendez's. He was not one of the individuals that had a knife or a box cutter, but he was present with three other individuals and they engaged in the behavior that resulted in the death of Daniel Montgomery eventually. Mr. Mendez, frankly, was a little less culpable in the fact that he did not have a weapon and was on the other side of the vehicle when Mr. Montgomery got stabbed (R.48 / 4,5).

At the plea hearing the trial court went through all the elements as set forth by Rule 11. The court informed the Defendant the possible maximum sentence that he could receive by pleading guilty (R. 48 /3). He asked if the Defendant if he felt "pressured by anyone to enter a plea of guilty today?"(R. 48 /3). He asked if the Defendant's mind was clear and if he understood what he was doing (R. 48 /3). He informed the Defendant of his right to a presumption of innocence, and that the burden of proof was on the prosecutor to prove him guilty of each element of the offense beyond a reasonable doubt (R. 48 / 4). The trial court told the Defendant of his right to a speedy public trial before an impartial jury, and his right to confront and cross-examine witnesses (R. 48 / 4). The court additionally related to the Defendant his right to utilize the subpoena power of the court to compel witness for the defense as well as his right to testify or not to testify under the 5th amendment (R. 48 / 4). The trial court also told the Defendant that his appeal rights would be limited by a plea of

guilty, and that all the other rights explained would be forfeited by pleading guilty (R. 48 / 4).

The Defendant had reviewed a statement in advance of plea (R. 22-27), which the Defendant acknowledged reviewing with his counsel. He signed that document in open court on the day of the plea (R. 48 / 7). Finally the court and the Defendant had the following exchange:

THE COURT: Before I take your plea, do you have any lingering questions that you want to ask Mr. Bouwhuis at this moment?

(Off-the-record discussion between Mr. Bouwhuis and the Defendant.)

THE DEFENDANT: No. (R. 46 / 7)

The Defendant then entered his guilty plea to the charge of felony Riot (R. 48 / 7).

The Defendant was then sentenced to a term of imprisonment not to exceed 5 years on January 9, 2003 (R. 19, 20). The Defendant thereafter filed a motion to withdraw a plea of guilty on January 13, 2003 (R. 29). The Defendant did not file any supporting memorandum with the motion, and the State filed a two-page objection to the motion (R. 33).

At the time of oral argument on the Defendant's motion, his new attorney related that the Defendant believed that he was improperly coerced into pleading guilty. He told his oral argument attorney that the only discussion he had with his plea attorney was "that there may be the potential of filing some kind of action against him

that involved him in that murder" (R. 49 / 2). The Defendant told his oral argument attorney the following:

> [T]hat whole thing caused him so much fear and concern about – about what maybe could happen that he didn't feel like he was paying as good of attention as he needed to at the time he was going through this with his counsel Mr. Bouwhuis. He also indicates to [argument counsel] that he attempted to get Mr.Bouwhuis to get him copies of his police reports.[1] Oral argument counsel stated, " [t]he potential for being involved in a murder which he had nothing to do with and didn't want to even be associated with caused him a great amount of concern and -- and fear when he got in the discussion about the plea. And that's why he jumped into this plea bargain, from his point of view" (R. 49 / 4).

Finally, the Defendant argued that he did not have an opportunity to go through the police reports prior to the guilty plea (R. 49 /5). Based upon the fact that the trial court had gone through the elements set forth under Rule 11, the court denied the Defendants motion to withdraw his plea (R. 49 /6).

SUMMARY OF ARGUMENTS

The Defendant argues that under the constitutions of both the state and federal government as well as Rule 11 of the Utah Rules of Criminal Procedure, a Defendant cannot be forced to plead guilty. The requirement that a Defendant's plea must be voluntary has its basis in both constitutional and statutory law, as well as under the general principle of justice. In the present case the Defendant believes that these basic guarantees of justice were denied him. The Defendant felt pressured to enter a plea of

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[1] Oral argument counsel stated, "I don't show any note of [defendant's request for police reports] in the file until the prelim, which is actually when he entered the plea" (R. 49 / 2).

guilty to a charge under a threat that the State would file a murder charge against him absent a plea. The Defendant pled at the time of the preliminary hearing despite the fact that he was asking for his police reports and had not discussed the same with defense counsel.

The Defendant was denied his constitutional right to effective assistance of counsel by the failure of his appointed counsel to provide him with police reports and by not adequately reviewing the evidence with the Defendant.

While the Defendant acknowledges that the trial court reviewed with him the rights required under Rule 11, and further acknowledges that he reviewed and signed the statement in advance of plea, he believes that his plea was nevertheless coerced. The Defendant believes that his plea counsel did not adequately provide him with the police reports that were necessary for him to understand the evidence against him, or lack thereof. He also was unable to intelligently discuss the ramifications of pleading guilty versus going to trial with his trial counsel without this vital information.

The Defendant understands that the Utah Appellate Courts have presumed that a Defendant has voluntarily entered a plea when the trial court complies with the required elements of Rule 11. The question as to whether or not the Defendant understood the evidence against him however is uncertain when he entered the plea at an early stage of the proceedings, and did so without the benefit of any documentary evidence. The Defendant is asking this Court to reverse the trial courts denial of his motion to withdraw his plea, and allow the Defendant to proceed to trial on the case.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO WITHDRAW HIS GUILTY PLEA

On December 5, 2002 the Defendant entered a guilty plea as charged to the first-degree felony murder charge. On or about January 14, 2003 the Defendant moved the trial court to allow him to withdraw that plea. The trial court thereafter held a hearing on the Defendant's motion to withdraw his plea. After that hearing, the trial court denied the Defendant's motion to withdraw his plea.

The Court in the case of *State v. Blair,* 868 P.2d 802, 805 (Utah 1993) held that the appellate court reviews "a trial court's denial of a motion to withdraw a guilty plea under an abuse-of-discretion standard." The Court has further noted that it applies "the clearly erroneous standard for the trial court's findings of fact made in conjunction with that decision." *State v. Benvenuto*, 983 P.2d 556, 558 (Utah 1999) "However, the ultimate question of whether the trial court strictly complied with constitutional and procedural requirements for entry of a guilty plea is a question of law that is reviewed for correctness." *State v. Benvenuto*, 983 P.2d 556, 558 (Utah 1999) (See also *State v. Thurman*, 911 P.2d 371, 372 (Utah 1996))

Rule 11(e)(2) of the Utah Rules of Criminal procedure provides:

> e) The court may refuse to accept a plea of guilty, no contest or guilty and mentally ill, and may not accept the plea until the court has found:
> (2) the plea is voluntarily made;

The trial court therefore, must ensure that the Defendant is voluntarily entering his plea, and has a duty to ensure that the Defendant is not being coerced or pressured in any manner. A trial court abuses its discretion by failing to grant the motion to withdraw the plea when a Rule 11 violation is present. In the case of *State v. Humphrey*, 79 P.3d 960, 962 (Utah Ct. App. 2003) this Court held:

> In the past, we have held that Rule 11 of the Utah Rules of Criminal Procedure creates "a presumption the plea was entered voluntarily" and "good cause exists where the plea was entered involuntarily." *State v. Thorup*, 841 P.2d 746, 748 (Utah Ct. App. 1993). In *Thorup*, we confirmed that compliance with Rule 11 is not dispositive in determining a motion to withdraw a plea. A defendant can show good cause by putting forth evidence that the plea was in fact involuntary.

In the present case, the Defendant timely filed a motion to withdraw his plea, based on Rule 11 violations of voluntariness.

The Defendant entered a plea of guilty to the charge of Riot, a third-degree felony, as charged in the original information. The plea negotiation process resulted in only one promise or supposed benefit to the Defendant by entering into the plea. The Defendant was promised that the prosecution would not file a possible murder charge against the Defendant. That single promise induced the Defendant to plead guilty, although the Defendant, at the time of the plea hearing had not even had an opportunity to review with his trial counsel the police reports that could have either supported or disproved that possible charge.

In the case of *State v. Pharris*, 798 P.2d 772, 774 (Utah Ct. App. 1990) the Court ruled that, "[b]oth the Utah Supreme Court and the Utah Court of Appeals have

allowed a Rule 11 challenge to the voluntariness of a plea to be considered for the first time on appeal." Further, in *Boykin v. Alabama*, 395 U.S. 238, 242 (1969) the Supreme Court reversed a guilty plea holding: "It was error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary." Although in the *Boykin* decision, the Court was presented with a plea to a then capital offense and the court taking the plea did not ask any questions regarding the plea, the fundamental principles are the same.

The Utah Supreme Court, in the case of *State v. Copeland*, 765 P.2d 1266, 1274 (Utah 1988) held "*Brady* and *Hammond*[2] require that in order for a plea to be voluntarily and knowingly made, the defendant must understand the nature and value of any promises made to him." (emphasis added) In the *Copeland* decision, the Court remanded the case back to the trial court for further findings regarding the defendant's mental state and his understanding of the plea negotiation promises. However, the Court noted:

> There are several problems with the plea bargain entered into by defendant. First, it appears either that he misunderstood the promise the State made to him regarding its sentencing recommendation or that the promise was illusory. Second, and more serious, is the claim that defendant's understanding of the promise caused him to be misled about the sentencing options available to the court and therefore the value of the bargain into which he was entering. (Id. at 1274)

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[2] *Brady v. United States,* 397 U. S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 742 (1970) *Hammond v. United States,* 528 F.2d 15 (4th Cir. 1975)

In the present case, the Defendant clearly did not understand the plea negotiations. He had not reviewed the police reports to even determine for himself whether or not his involvement in the murder would arise to a level that could result in his conviction for that offense. Admittedly, the trial court asked the Defendant " do you have any lingering questions that you want to ask Mr. Bouwhuis at this moment?" to which the Defendant stated "no". The trial court also asked the Defendant if he felt pressured by anyone to enter his plea, to which the Defendant again responded in the negative. The complicating factor was that the Defendant felt pressure by the very counsel who was supposed to ensure that no pressure was present.

In *Brady v. United States,* 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 742 (1970), the United States Supreme Court held:

> "[A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes)."

The Utah Court of Appeals in the case of *State v. Norris,* 57 P.3d 238, 241 (Utah Ct. App. 2002) reversed a defendant's conviction by guilty plea, when it determined:

> Both the trial court and the State clearly promised Norris that he could pursue a claim for vindictive prosecution on appeal, but neither the court nor the State could fulfill that promise. The court's legal error exaggerated the benefits Norris would receive from pleading guilty.

> Thus it misled Norris as to "the nature and value of [the] promise[] made to him." (Quoting *State v. Copeland* at 1274.)

The Court held: "Thus, Norris's pleas were not made voluntarily with full knowledge of the consequences of pleading guilty." (Id. at 241)

In the case at bar, the trial court failed to establish the basic requirement of Rule 11, in that the court did not ensure that the plea was voluntarily taken. Specifically, the court, knowing that the only concession to the Defendant in the plea to the crime as charged in the original information was the promise by the prosecution not to file a murder charge, did not make an adequate record to ensure that the Defendant did in fact "understand the nature and value of any promises made to him." (*State v. Copeland* infra emphasis added).

The Defendant should be allowed to withdraw his guilty plea and face this charge due to his lack of understanding of the evidence against him on the threatened murder charge. Before the trial court fulfills its duties in ensuring that the defendant fully understands the ramifications of his plea, the court must also determine that the defendant understands the possible jeopardy he might face by going ahead with the trial. Until this understanding is guaranteed, the trial court should not allow a plea of guilty to proceed.

POINT II

THE DEFENDANT WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, AND ARTICLE 1, SECTIONS SEVEN AND TWELVE OF THE UTAH CONSTITUTION BY HIS ATTORNEY'S FAILURE TO INFORM DEFENDANT OF THE EVIDENCE IN THE CASE.

The United States Supreme Court has recognized that "the right to counsel is the right to the effective assistance of counsel." *Strickland v. Washington,* 466 U.S. 668, 686, 80 L.Ed.2d 674, 692 (1984). In *Strickland,* the Supreme Court established a two-part test to determine whether counsel's assistance was ineffective. "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington,* 466 U.S. at 687, 80 L.Ed.2d at 693.

In making that assessment, the Court in *Strickland v. Washington* gave some guidance in noting; "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." (Id. at 688) Although the Court in Strickland did not "exhaustively define the obligations of counsel nor form a checklist for judicial evaluation of attorney performance", (Id. at 688) it did mention certain minimal requirements. These duties include, "a duty of loyalty, a duty to avoid conflicts of interest" as well as a duty "to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course

of the prosecution" (Id. at 688) Additionally, the overreaching requirement by the Supreme Court in ineffective assistance of counsel cases is that the "performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." (Id. at 688)

Several other cases more specifically define when a defense counsels performance has slipped below the threshold cited above.

In the case of *Kimmelman v. Morrrison*, 477 U.S. 365 (1986) the Court was presented with a case where defense counsel, due to a failure to conduct proper discovery, did not timely file a motion to suppress evidence under the 4th amendment. The Court of Appeals reversed his conviction under an ineffective assistance of counsel claim. The Supreme Court affirmed that reversal. In that affirmation of reversal the Court stated:

> Where defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice. (*Kimmelman v. Morrrison*, 477 U.S. 365, 375 (1986))

In making the determination that trial counsels conduct failed to comport with constitutional requirements the Court held:

> In this case, however, we deal with a total failure to conduct pretrial discovery, and one as to which counsel offered only implausible explanations. Counsel's performance at trial, while generally creditable enough, suggests no better explanation for this apparent and pervasive failure to "make reasonable investigations or to make a reasonable

> decision that makes particular investigations unnecessary." [citation omitted] Under these circumstances, although the failure of the District Court and the Court of Appeals to examine counsel's overall performance was inadvisable, we think this omission did not affect the soundness of the conclusion both courts reached — that counsel's performance fell below the level of reasonable professional assistance in the respects alleged. (*Kimmelman v. Morrrison*, 477 U.S. 365, 386 (1986))

In the case of *Wiggins v. Smith*, 02-311, (U.S. 2003) the U.S. Supreme Court found that counsel's failure to investigate the extensive abuse the defendant had suffered through his life was unreasonable. The Court reversed his conviction on the grounds that this failure resulted in defense counsels inability to present this evidence to the sentencing jury in a capital case. The Court stated:

> We further find that had the jury been confronted with this considerable mitigating evidence, there is a reasonable probability that it would have returned with a different sentence. (*Wiggins v. Smith* at Point III)

The Utah Appellate Courts have adopted the *Strickland* test and have likewise rendered decisions in ineffective assistance of counsel cases that can guide a determination of when a defense attorney fails in his appointed duties.

In the case of *State v. Gallegos*, 967 P.2d 973 (Utah Ct. App. 1998) the Court found held that the failure of trial counsel to object to a 4th Amendment violation constituted reversible ineffective assistance of counsel error. In that case, the Court applied the *Strickland* test to a situation where defense counsel had in a pretrial motion moved to suppress evidence on the basis of an illegal search. The trial court denied that motion based upon evidence at a preliminary hearing. During trial the

officer altered his testimony establishing the lack of plain view, yet trial counsel did not re-raise the motion to suppress. The Court held that "where a defendant can show that there was no conceivable legitimate tactical basis for counsel's deficient actions, the first prong of *Strickland* is satisfied." (Id. at 976, quoting *State v. Snyder,* 860 P.2d 351, 359 (Utah Ct. App. 1993))

In the case of *State v. Smith*, 65 P. 3d 648, 656 (Utah Ct. App. 2003) the Utah Court of Appeals reversed a defendant's conviction under an ineffective assistance of counsel theory where counsel "fail[ed] to move for a directed verdict after the State failed to present evidence that Smith did not possess a valid concealed weapon permit during its case in chief."

In *Williams v. Taylor*, 529 U.S. 362, 391 (2000) the U.S. Supreme Court expanded the *Strickland* test in certain circumstances. The Court stated:

> It is true that while the *Strickland* test provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims, there are situations in which the overriding focus on fundamental fairness may affect the analysis.

In *Williams v. Taylor*, the Court reversed the defendants death sentence on an ineffective assistance of counsel claim where the defense counsel did not investigate the defendant's "nightmarish childhood", nor the fact that the defendant was "borderline mentally retarded" (Id. at 395, 396) The Court concluded that defense counsel unreasonably failed to begin mitigation investigation until one week prior to

trial, and then unreasonably failed to investigate numerous areas of mitigating evidence that could have benefited the defendant in the penalty phase.

In the case of *State v. Bennett* 999 P.2d 1, 3, (Utah 2000) Justice Durham, in a concurring opinion noted:

> ¶ 13 This court's supervisory power is an inherent power which has been recognized in many cases. See, e.g., *State v. Arguelles*, 921 P.2d 439, 442 (Utah 1996) (noting, in ineffective assistance of counsel case, that "pursuant to our inherent supervisory power over the courts, we may presume prejudice in circumstances where it is unnecessary and ill-advised to pursue a case-by-case inquiry to weigh actual prejudice"

In the present case, the representation of the Defendant taken as a whole was defective, and constitutionally inadequate. The defense counsels failure to provide the Defendant with copies of the police report coupled with the speed in which defense counsel pushed this matter through to plea constitutes this inadequacy. The plea was taken on the same day that the Defendant waived his preliminary hearing, and in light of the fact that he had requested a copy of the police report. Once the plea was taken, any value of having the police report is significantly diminished. The element of "fundamental fairness," addressed in *Williams v. Taylor* should be examined and adopted.

Rule 1.4 of the Utah Rules of Professional Conduct governing lawyers provides in relevant part:

> (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

> (b) A lawyer shall explain a matter to the extent reasonably necessary to enable the client to make informed decisions regarding the representation.

Clearly there was a failure by defense counsel in the present case to properly comply with these requirements. Defense counsel did not "promptly comply with reasonable requests for information", nor did counsel "explain a matter to the extent reasonably necessary to enable the client to make informed decisions." The Defendant, through his motion counsel Mr. Allen told the court that:

> [T]hat whole thing caused him so much fear and concern about – about what maybe could happen that he didn't feel like he was paying as good of attention as he needed to at the time he was going through this with his counsel Mr. Bouwhuis. He also indicates to [argument counsel] that he attempted to get Mr.Bouwhuis to get him copies of his police reports. Oral argument counsel stated, " [t]he potential for being involved in a murder which he had nothing to do with and didn't want to even be associated with caused him a great amount of concern and -- and fear when he got in the discussion about the plea. And that's why he jumped into this plea bargain, from his point of view" (R. 49 / 4).

A defendant should not have to jump into a plea bargain under a cloud of fear and misunderstanding. If nothing more, plea counsel should adequately explain the effects of the plea, provide the defendant with relevant reports and information, and allow the defendant time to digest this information and come to a reasoned and logical decision devoid of pressure. In the present case this simply did not occur.

The second prong of the two-part test articulated in *Strickland* is "the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair

trial, a trial whose result is reliable." *Strickland v. Washington,* 466 U.S. at 687, 80 L.Ed. 2d at 693.

In *Strickland,* the Court held that "[t]he purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding." In *State v. Templin*, 805 P.2d 182 (Utah 1990), the Utah Supreme Court held that to meet the second part of the *Strickland* test a defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 187(quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)). In making the determination that counsel was ineffective the appellate court should "consider the totality of the evidence, taking into account such factors as whether the errors affect the entire evidentiary picture or have an isolated effect and how strongly the verdict is supported by the record." *Id.*

Clearly, in the present case, if defense counsels had spent the appropriate time discussing the case with his client, and providing him with requested documents concerning his case, the plea would not have been entered. This meets the second prong of the *Strickland* test in that "the result[s] of the proceeding would have been different."

CONCLUSION

Based upon the foregoing, the Defendant respectfully asks this Court to reverse the trial courts denial of his motion to withdraw his plea, and allow him to proceed to trial on the case.

DATED this 26 day of February, 2004.

RANDALL W. RICHARDS
Attorney for Appellant

CERTIFICATE OF MAILING

I certify that I mailed two copies of the foregoing Brief of Appellant to Mark Shurtliff Attorney General, Attorney for the Plaintiff, 160 East 300 South, 6th Floor PO Box 140854 SLC, Utah 84114-0180, postage prepaid this 26 day of February, 2004.

RANDALL W. RICHARDS
Attorney at Law

ADDENDUM

ADDENDUM A

IN THE DISTRICT COURT OF WEBER COUNTY

STATE OF UTAH

*****

STATE OF UTAH,	)	
	)	
Plaintiff,	)	
	)	VIDEO TRANSCRIPT
vs.	)	
	)	CASE NO. 021905367
CARLOS MENDEZ,	)	
	)	
Defendant.	)	

*****

PLEA

DECEMBER 5, 2002

HONORABLE MICHAEL D. LYON

*****

APPEARANCES:

FOR THE STATE: MS. CAMILLE L. NEIDER

FOR THE DEFENDANT: MR. MICHAEL D. BOUWHUIS

*****

20030617-CA

ORIGINAL

PROCEEDINGS

THE COURT: State of Utah versus Carlos Mendez.

MR. BOUWHUIS: This is Mr. Mendez, Your Honor. We have reached a plea agreement in his case. He signed an advance -- a plea in advance of -- a statement -- what do you call that thing? He signed that statement we gave to the Court.

And what he's going to be doing, Your Honor, is pleading guilty to a third degree felony riot. In exchange for that, the State has agreed not to file any other charges, including a murder charge they were considering.

THE COURT: Is that the State's agreement?

MS. NEIDER: It is, Judge.

THE COURT: Thank you.

Mr. Mendez, do you understand the agreement?

THE DEFENDANT: Yes, I do.

THE COURT: Do you have any questions about it?

THE DEFENDANT: No.

THE COURT: You've had an opportunity to review this written plea agreement with your lawyer, have you?

THE DEFENDANT: Yeah.

THE COURT: Do you have any questions about it?

THE DEFENDANT: No, I don't.

THE COURT: Did you understand everything?

THE DEFENDANT: Yes.

THE COURT: And did you voluntarily sign this agreement?

THE DEFENDANT: Yes.

THE COURT: I'm going to ask you some questions that somewhat parallel what you've read in this agreement, but I'm required to be personally satisfied that your plea today is knowing and voluntary.

First of all, do you understand that you're pleading guilty to a third degree felony riot charge?

THE DEFENDANT: Yes.

THE COURT: Carries a prison sentence up to five years and a fine not to exceed $5,000. Do you understand the penalties?

THE DEFENDANT: Yes, I do.

THE COURT: Do you feel pressured by anyone to enter a plea of guilty today?

THE DEFENDANT: No.

THE COURT: Your mind is clear and you understand what you're doing?

THE DEFENDANT: Yes, I do.

THE COURT: Do you understand that you're presumed under the law to be innocent of any crime until the State proves each element of the offense against you beyond a reasonable doubt?

THE DEFENDANT: Yes.

THE COURT: You have the right to a speedy public trial before an impartial jury. At trial, you would have the right to confront and cross-examine the prosecution's witnesses. You'd have the right to subpoena your witnesses to assist you with your defense. You'd have the right to make a statement to the jury, or you could elect to remain silent. No one could compel you to give evidence against yourself. Do you understand each of these rights?

THE DEFENDANT: Yes, I do.

THE COURT: Do you understand that -- that if you plead guilty, you're waiving or giving up all of these rights today?

THE DEFENDANT: (Inaudible)

THE COURT: Do you understand that any appeal that you file following sentencing will be limited in its scope because there's not a lot to appeal from after you've pleaded guilty?

THE DEFENDANT: Yes, I do.

THE COURT: All right. May I have a factual basis for the plea?

MS. NEIDER: Judge, this is a related case to the case that you heard -- Mr. Rios's case a couple of weeks ago. But Mr. Mendez is one of the four individuals that was present and -- and I know you're familiar with the facts, that all of this resulted in the death of Daniel Montgomery.

But Mr. Mendez's particular involvement was that he acknowledged to Detective Zaccardi that he approached Mr. Montgomery in his vehicle and spoke to him that day prior to any altercation. And then Mr. Montgomery -- and when his -- Mr. Montgomery and his friends came back, Mr. Mendez was one of the four that was there. And that he pushed one of the individuals in the altercation that occurred afterwards. And there were also fingerprints on the car that were Mr. Mendez's. He was not one of the individuals that had a knife or a box cutter, but he was present with three other individuals and they engaged in the behavior that resulted in the death of Daniel Montgomery eventually.

Mr. Mendez, frankly, was a little less culpable in the fact that he did not have a weapon and was on the other side of the vehicle when Mr. Montgomery got stabbed.

THE COURT: Have you discussed this plea bargain of sorts with the victim's family?

MS. NEIDER: Judge, we've discussed with the family -- and some of them are here today. We've discussed what charges would be leveled against Mr. Mendez and I've explained to them that he is pleading and there are no agreements on sentencing as far as what -- as far as the plea is concerned.

THE COURT: Under the circumstances, the -- the victim's family feels accepting of what you're proposing

today?

MS. NEIDER: I think so, Judge. If you want to inquire of them, but we've had discussions about what the potential charges were.

THE COURT: Okay.

MS. NEIDER: And they've understood why we made the decision to charge him --

THE COURT: Okay.

MS. NEIDER: -- the way that we did.

THE COURT: All right. In order to convict you of this offense of riot, a third degree felony, the State would need to prove beyond a reasonable doubt that you simultaneously with two or more other persons engaged in tumultuous or violent conduct, thereby knowingly or recklessly creating a risk of substantial -- a substantial risk of causing public harm, alarm, and as a result of the conduct a person was -- was injured -- in this case killed. Do you understand those elements?

THE DEFENDANT: I do.

THE COURT: Do you understand that your plea of guilty today is an admission of those elements?

THE DEFENDANT: Yes.

THE COURT: Before I take your plea, do you have any lingering questions that you want to ask Mr. Bouwhuis at this moment?

(Off-the-record discussion between Mr. Bouwhuis and the defendant.)

THE DEFENDANT: No.

THE COURT: Did you, in fact, engage -- or commit this crime?

THE DEFENDANT: Yes.

THE COURT: All right. To the charge then of riot, a third degree felony, do you plead guilty or not guilty?

THE DEFENDANT: Guilty.

THE COURT: All right. The Court accepts your plea and finds for the record that this plea is knowing and voluntary. You have a right to make a motion to withdraw the plea if it's made in writing within 30 days following sentencing.

Do you have a recommended date for sentencing?

PROBATION: January 9th?

THE COURT: Sentencing will be January 9th, two o'clock.

MR. BOUWHUIS: Which date was that? January 9th?

THE COURT: You're held in jail pending sentencing.

Mr. Bouwhuis, we need to have him sign this agreement. It's unsigned by him.

Mr. --

MR. BOUWHUIS: I thought he signed it. Maybe I didn't have him sign it.

(Defendant signs agreement)

MR. BOUWHUIS: Sorry about that, Judge.

THE COURT: No problem. Thank you.

(Proceedings conclude)

CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF WEBER)

I, Laurie Shingle, do hereby certify that the foregoing eight pages of transcript constitute a true and accurate record of the video proceedings to the best of my knowledge and ability as a Certified Shorthand Reporter for the Second Judicial District Court of Weber County in and for the State of Utah.

Dated at Ogden, Utah, this the 18th day of September, 2003.

Laurie Shingle, RPR

ADDENDUM B

IN THE DISTRICT COURT OF WEBER COUNTY

STATE OF UTAH

*****

STATE OF UTAH,	)	
	)	
Plaintiff,	)	
	)	VIDEO TRANSCRIPT
vs.	)	
	)	CASE NO. 021905367
CARLOS MENDEZ,	)	
	)	
Defendant.	)	

*****

ORAL ARGUMENTS

JULY 10, 2003

HONORABLE MICHAEL D. LYON

*****

APPEARANCES:

FOR THE STATE: MS. CAMILLE L. NEIDER

FOR THE DEFENDANT: MR. BERNARD L. ALLEN

*****

ORIGINAL

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20030617-CA

Laurie Shingle, RPR
(801) 395-1055

PROCEEDINGS

THE COURT: State of Utah versus Carlos Mendez. This is a motion for leave to withdraw a guilty plea. I've read the motion and supporting memorandum. Actually, I don't believe there is a supporting memorandum, just a motion filed by the defendant. I've read the State's response. I'll hear argument on the motion.

MR. ALLEN: Yes, Your Honor. Mr. Mendez was involved in a situation that blew out of hand on him. He indicates that one of the problems in this case was because it involved that much more serious event that he was peripherally involved in, the discussion was continuously brought up to him that they -- that there may be the potential of filing some kind of action against him that involved him in that murder. That was the basis for the plea negotiation.

And his indication to me is that that -- that whole thing caused him so much fear and concern about -- about what maybe could happen that he didn't feel like he was paying as good of attention as he needed to at the time he was going through this with his counsel Mr. Bouwhuis.

He also indicates to me that he attempted to get Mr. Bouwhuis to get him copies of his police reports, although I don't show any note of that in the file until the prelim, which is actually when he entered the plea.

The plea was to a third degree riot. Under the circumstances of the case, the defendant has been before the Board and apparently they gave him a full five years on the -- on the parole date on that five -- zero to five.

So those are basically the circumstances surrounding the case. I didn't get anything from Mr. Bouwhuis indicating a failure in the Rule 11 questionnaire that occurred before Your Honor in -- in the court. I know this happened back in -- in January, so I don't think there was a statement in advance of plea, but I'm not sure about that. Do you have a statement in advance of plea in the file in this case?

THE COURT: I do have one.

MR. ALLEN: Oh, okay. And my recollection is at that time you were doing a full colloquy as well as the statement.

THE COURT: Yes.

MR. ALLEN: So I'm -- I'm assuming that the record will reflect that Rule 11 was complied with. I don't -- Mr. Bouwhuis didn't know of any -- any concerns on that regard.

But he does -- he does admit -- Mr. Bouwhuis admitted to me that there was this discussion, and I'm not sure how that fits in. I guess that's part of any plea that you have that kind of talk.

THE COURT: Uh-huh.

MR. ALLEN: But the potential for being involved in a murder which he had nothing to do with and didn't want to even be associated with caused him a great amount of concern and -- and fear when he got in the discussion about the plea. And that's why he jumped into this plea bargain, from his point of view.

THE COURT: All right. Thank you, Mr. Allen.

Ms. Neider?

MS. NEIDER: Judge, frankly, I know that Mr. Allen hasn't been involved in any of these cases, but that was a significant part of the negotiation and part of -- as we dealt with these cases that he may potentially face a murder charge. And the State was very upfront about that with Mr. Bouwhuis, and I'm sure that was conveyed to him. And my recollection is we talked about that on the record, that that was part of the reason why he may be pleading.

So I don't think that it goes to whether or not there's good cause for withdrawing his plea now. We were all upfront about what he was giving up and -- but what he may potentially face as well if he chose to go forward and fight the charges or if he wanted to go forward on the charge that he -- was in front of him on that day.

I didn't see that there was anything in the motion that qualified as good cause the fact that he was scared. It wasn't indicated necessarily on the record. He appeared to

be voluntarily entering his plea and I think that the Court did a very thorough Rule 11 colloquy. The Court has been very thorough on all of these cases surrounding this one event that led to the death of Mr. Montgomery.

So, Judge, I don't think it rises to the level of good cause and we would ask you to deny the defendant's motion.

MR. ALLEN: Judge --

THE COURT: Thank you.

(Off-the-record discussion between Mr. Allen and the defendant.)

MR. ALLEN: He just wanted to reiterate that he had not had an opportunity to go through the police reports at that preliminary hearing. I -- I don't know -- typically Mr. Bouwhuis will go through and read the reports. This was a very voluminous report though and there may be some information in there that he did not see prior to entering the plea. Whether that affected him being able to enter this plea knowingly is the question, I think.

So that's -- those are the issues, Your Honor.

THE COURT: Thank you.

Mr. Mendez, the Court denies your motion. The standard -- the legal standard that is applied to these kind of cases in order to withdraw a guilty plea is that you must show good cause. I find no good cause in this case.

Good cause typically occurs when the plea is entered

involuntarily. The file shows a plea agreement that very carefully goes through the legal requirements in order for this Court to be satisfied that you entered a knowing and voluntary guilty plea. I also covered with you orally those same matters. And I'm satisfied that having strictly complied with that requirement that you entered a knowing and voluntary plea.

I understand your point that you feel that you felt some pressure and fear in facing some of these charges; no more, I think, than most defendants.

Now, I recognize that this case was a murder case, but you did not -- but you pled to a third degree felony riot charge, which was a lesser charge. I understand that you may have felt some exposure to a more serious charge, but these are the things that you had an opportunity to weigh with your lawyer who gave you advice in this case.

I went over -- during that colloquy with you, that discussion that I had prior to taking your plea, I -- one of the questions that I uniformly ask is, are you satisfied with the advice that your lawyer gave you? And you responded that you were. And now to come later and say, you know, that he didn't provide you with police reports is just somewhat lame.

So I'm not going to allow you to withdraw your plea, and if you want to pursue it, there are other remedies that you have under Rule 65(c).

MR. ALLEN: Thank you, Your Honor.

THE COURT: Thank you.

(Proceedings conclude)

CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF WEBER)

I, Laurie Shingle, do hereby certify that the foregoing seven pages of transcript constitute a true and accurate record of the video proceedings to the best of my knowledge and ability as a Certified Shorthand Reporter for the Second Judicial District Court of Weber County in and for the State of Utah.

Dated at Ogden, Utah, this the 18th day of September, 2003.

Laurie Shingle

Laurie Shingle, RPR